INDEX

	Page
Jurisdiction	2
Question Presented	2
Statement of the Case	2
Reasons for Denying the Writ	4
Conclusion	20
Appendix	21

TABLE OF AUTHORITIES CITED

TABLE OF CASES

Page

Adams v. Davison-Paxon Co.,
230 S.C. 522, 96 S.E. 2d 566 (1957) 8

Adams v. Iten Biscuit Co.,
63 Okl. 52, 162 Pac. 938 (1917) 7

Blass v. Weigel,
85 F. Supp. 775 (D.C.N.J. 1949) 8

Bothwell v. Boston Elevated Ry Co.,
215 Mass. 467, 102 N.E. 665 (1913) 7

Burgess v. Gibbs,
262 N.C. 462, 137 S.E. 2d 806 (1964) 8

Byrd v. Blue Ridge Electric Cooperative,
356 U.S. 525, 78 S.Ct. 893 (1958) 4, 9, 14

Chesapeake & Ohio R. Co. v. Carnahan,
241 U.S. 241, 36 S.Ct. 594 (1916) 5

Chesapeake & Ohio Ry. Co. v. Gainey,
241 U.S. 494, 36 S.Ct. 633 (1916) 5

Chesapeake & Ohio R. Co. v. Kelly,
241 U.S. 485, 36 S.Ct. 630 (1916) 5

Chicago, R. I. & P. R. Co. v. Ward,
252 U.S. 18, 40 S.Ct. 275 (1920) 6

Cunningham v. Northwestern Imp. Co.,
44 Mont. 180, 119 Pac. 554 (1911) 7

Dagnello v. Long Island Rail Road Company,
289 F.2d 797 (2d Cir. 1961) 16

TABLE OF CASES (Continued)

Page

Diederich v. American News,
128 F.2d 144 (10th Cir. 1942) 17

Dimick v. Schiedt,
293 U.S. 474, 55 S.Ct. 296 (1935) 16

Dohany v. Rogers,
281 U.S. 362, 50 S.Ct. 299 (1930) 6

Dolese Bros. v. Tollett,
162 Okl. 158, 19 P.2d 570 (1933) 8

Donaldson v. Great Northern Ry. Co.,
89 Wash. 161, 154 Pac. 133 (1916)
aff'd, 246 U.S. 121, 38 S.Ct. 230 8

Drury v. Franke,
247 Ky. 758, 57 S.W.2d 969 (1933) 7

Edwards v. Elliott,
21 Wall. 532, 22 L.Ed. 487 (1874) 5

Erie R. Co. v. Tompkins,
304 U.S. 64, 58 S.Ct. 817 (1938) 9

Ex parte Homewood Dairy Products Co.,
241 Ala. 470, 3 So.2d 58 (1941) 7

Florida East Coast Ry. Co. v. Hayes,
67 Fla. 101, 64 So. 504 (1914) 7

Fontenot v. Marquette Cas. Co.,
161 So. 2d 467 (La. App. 1963) 7, 8

Freire v. Matson Nav. Co.,
109 P.2d 1022 (Cal. App. 1941 8

Gatton v. Chicago, R. I. & P. Ry. Co.,
95 Iowa 112, 63 N.W. 589 (1895) 7

TABLE OF CASES (Continued)

Page

Gibson v. Bellingham & N. Ry. Co.,
213 Fed. 488 (W.D. Wash. 1914) 8

Gideon v. Wainright,
372 U.S. 335, 83 S.Ct. 792 (1963) 9, 10

Gray v. Mossman,
91 Conn. 430, 99 Atl. 1062 (1917) 7

Guaranty Trust Co. of New York v. York,
326 U.S. 99, 65 S.Ct. 1464 (1945) 9

Gulf & S. I. R. Co. v. Hales,
140 Miss. 829, 105 So. 458 (1925) 7

Gustafson v. Peck,
216 F. Supp. 370 (N.D. Iowa 1963) 8

Hall v. Armstrong,
65 Vt. 424, 26 Atl. 592 (1893) 7, 8

Hawkins v. Bleakly,
243 U.S. 210, 37 S.Ct. 255 (1917) 6

Hayworth v. Bromwell,
158 N.E.2d 285 (Ind. 1959) 7

In re Condemnation of Certain Land for New State House,
19 R.I. 326, 33 Atl. 448 (1895) 7

Iowa Central R. Co. v. Iowa,
160 U.S. 389, 16 S.Ct. 344 (1896) 5

Irwin v. Globe-Democrat Pub. Co.,
368 S.W.2d 452 (Mo. 1963) 7, 8

Klopfer v. North Carolina,
— U.S. —, 87 S.Ct. 988 (1967) 9, 10, 17

TABLE OF CASES (Continued)

Page

Kovacs v. Cooper,
336 U.S. 77, 69 S.Ct. 448 (1949) 20

Kraas v. American Bakeries Co.,
231 Ala. 278, 164 So. 565 (1935) 7

Lewis and Clark County v. Industrial Acc. Board,
52 Mont. 9, 155 Pac. 268 (1916) 15

Louisville & Nashville R. Co. v. Stewart,
241 U.S. 261, 36 S.Ct. 586 (1916) 5

Malloy v. Hogan,
378 U.S. 1, 84 S.Ct. 1489 (1964) 9, 10

Mapp v. Ohio,
367 U.S., 643, 81 S.Ct. 1684 (1961) 9

Middleton v. Whitridge,
213 N.Y. 499, 108 N.E. 192 (1915) 7

Minneapolis & St. L. R. Co. v. Bombolis,
241 U.S. 211, 36 S.Ct. 595 (1916) 5, 6

Mountain Timber Co. v. Washington,
243 U.S. 219, 37 S.Ct. 260 (1917) 5

New Jersey Chiropractic Ass'n v. State Board,
79 F. Supp. 327 (D.C.N.J. 1948) 8

New State Ice Co. v. Leibmann,
285 U.S. 262, 52 S.Ct. 371 (1932) 16

New York Central R. Co. v. White,
243 U.S. 188, 37 S.Ct. 247 (1917) 5

O'Donnell v. Watson Bros. Transportation Company,
183 F. Supp. 577 (N.D. Ill. 1960) 8

TABLE OF CASES (Continued)

Page

Palko v. Connecticut,
302 U.S. 319, 58 S.Ct. 149 (1937) 9, 10, 12, 18

Parizo v. Wilson,
101 Vt. 514, 144 Atl. (1929) 7

Parker v. McGinty,
77 Colo. 458, 239 Pac. 10 (1925) 7

Pearson v. Yewdall,
95 U.S. 294, 24 L.Ed. 436 (1877) 5

Pointer v. Texas,
380 U.S. 400, 85 S.Ct. 1065 (1965) 9

Porter v. Watkins,
217 Ga. 73, 121 S.E.2d 120 (1961) 7, 8

Richie v. Badger State Mut. Cas. Co.,
22 Wis. 2d 133, 125 N.W.2d 381 (1963) 8

Ruth v. Sorensen,
104 So.2d 10 (Fla. 1958) 7

St. Louis & Kansas City Land Co. v. Kansas City,
241 U.S. 419, 36 S.Ct. 647 (1916) 5

St. Louis & S. F. R. Co. v. Brown,
241 U.S. 223, 36 S.Ct. 602 (1916) 5

St. Louis & S. F. R. Co. v. Brown,
45 Okl. 143, 144 Pac. 1075 (1914),
aff'd, 241 U.S. 223, 36 S.Ct. 602 7

Schaefer v. Gunzburg,
246 F.2d 11 (9th Cir. 1957), cert. denied, 355
U.S. 831, 78 S.Ct. 45 ..... 16, 17

TABLE OF CASES (Continued)

Page

Southern Ry. Co. v. City of Durham,
266 U.S. 178, 45 S.Ct. 51 (1924) 6

State of Washington v. Mountain Timber Co.,
75 Wash. 581, 135 Pac. 645 (1913)
affff'd, 243 U.S. 219, 37 S.Ct. 260 8

Vescio v. Pennsylvania Electric Co.,
9 A.2d 546 (Pa. 1939) 8

Wagner Electric Mfg. Co. v. Lyndon,
262 U.S. 226, 43 S.Ct. 589 (1923) 6

Walker v. Sauvinet,
92 U.S. 90, 23 L.Ed. 678 (1876) 5

Washington v. Texas,
— U.S. —, 87 S.Ct. 1920 (1967) 9, 10

Wear v. State of Kansas,
245 U.S. 154, 38 S.Ct. 55 (1917) 6

White v. White,
183 S.W. 369 (Tex. Civ. App. 1916) 7

TABLE OF STATUTES

Page

ARIZ. REV. STAT. ANN. § 22-201 (1964) 17

ARIZ. REV. STAT. ANN. § 21-103 (1962) 17

ARIZ. REV. STAT. ANN. § 21-102B (1956) 18

TABLE OF OTHER MATERIALS

Page

Desmond, *Should it Take Thirty-four Months for a Jury Trial?*, N .Y. Times, Dec. 8, 1963 (Magazine) 11

Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949) 13

The Federalist, No. 83 (Colonial Press, Rev. Ed.) 11

Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965) 13, 18

Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963) 12

KALVEN AND ZEISEL, THE AMERICAN JURY (1966) 11, 15, 17, 19

Warren, *Delay and Congestion in the Federal Courts*, 42 J.AM.JUD.SOC. 6-7 (1958) 18

ZEISEL, KALVEN AND BUCHHOLZ, DELAY IN THE COURTS (1959) 15, 19

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 454

ROBERT D. MORGAN,

Petitioner,

v.

JACK D. H. HAYS, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF MARICOPA, AND SAID SUPERIOR COURT,

and

METRO-GOLDWYN-MAYER, INC.,

a Delaware corporation,

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

OPINIONS BELOW

The opinion of the Arizona Supreme Court is reported at ____ Ariz. ____, 426 P.2d 647 (1967).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether this Court should overrule almost a century of decisions of this Court and numerous other federal and state courts, and require the states to furnish jury trials conforming to the federal model in all civil cases involving more than $20.00.

STATEMENT OF THE CASE

The Petitioner, Robert D. Morgan, was injured on April 9, 1962, while working for the Respondent and Real Party in Interest, Metro-Goldwyn-Mayer, Inc. (MGM), as a stunt man in the filming of the movie, "How The West Was Won." MGM had its employees covered by Workmen's Compensation insurance, both in the State of Arizona and in the State of California, during the entire time that Petitioner was employed by MGM.

After the accident, while he was in the hospital, and while he was lucid and responsive, Petitioner sought and obtained the legal advice of a prominent Phoenix law firm, Snell & Wilmer. After consulting with two lawyers of that firm and receiving an opinion from them that he should apply for and accept Workmen's Compensation, Petitioner executed or caused the execution of a "Workmen's Report of Injury and Application for Benefits," a form report supplied by the Arizona Industrial Commission. From May 23 through December 2, 1962, Petitioner filed, also on Industrial Commission forms, fourteen different documents entitled "Workmen's Supplemental Claim for Compensation"; he understood that these were claims for Workmen's Compensation. Pursuant to each of these claims, Petitioner received and accepted Workmen's Compensation payments.

On December 13, 1962, after consulting with other counsel, Petitioner filed the instant lawsuit against his employer based upon alleged common law negligence. After the lawsuit was filed, he accepted, endorsed, and cashed an additional check for Workmen's Compensation benefits.

MGM filed a Motion to Dismiss Petitioner's Complaint on the ground that, by virtue of Arizona's Workmen's Compensation law, the Superior Court lacked jurisdiction to entertain the negligence action. Pursuant to the Arizona rule that "a question of election to take under the Workmen's Compensation statute is a preliminary question to be decided by the trial court prior to jury trial,"[1] the Respondent Judge Hays, to whom the case had been assigned, held a hearing which lasted for four days, on the question whether under the State Workmen's Compensation Act Petitioner was precluded from bringing a common law negligence suit against his employer. On the basis of evidence presented at the hearing, Judge Hays concluded that because Morgan was covered by and had accepted Workmen's Compensation benefits, exclusive jurisdiction over his claim lay in the Arizona State Industrial Commission. Judge Hays' careful and detailed findings of fact and conclusions of law are set forth in the Appendix to this Brief.

Judge Hays' ruling was affirmed by the Arizona Supreme Court, reviewing the case by Writ of Certiorari. As is the case with his Petition for Certiorari filed with this Court, Petitioner's Brief before the Arizona Supreme Court was devoted almost exclusively to issues of state law. The Arizona Court, both the majority and the dissent, dealt solely with state law problems.

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[1]Lower Court opinion; Pet. App., p. 16.

REASONS FOR DENYING THE WRIT

The great bulk of the Petition for Certiorari is devoted to questions of state law. The only possible federal issue—whether Petitioner had a federal right to a jury trial on the question of whether, under the Arizona Workmen's Compensation law, he was precluded from bringing a common law action against his employer—is blandly assumed by Petitioner without argument.

The Petition for Writ of Certiorari should be denied for two separate and independently sufficient reasons:

(1) This Court and all other Courts which have considered the problem have consistently and unanimously held that the allocation of functions between judge and jury in state court proceedings is a matter of state law, unaffected by the Seventh and Fourteenth Amendments to the United States Constitution. These holdings have been reaffirmed by this Court as recently as 1958 and by other courts even more recently.

(2) If there is to be a re-examination of the long line of cases holding that the Seventh Amendment is not binding upon the states through the Fourteenth, this is neither the time nor the case in which to do it.

I

This Court in *Byrd v. Blue Ridge Electric Cooperative*, 356 U.S. 525, 78 S.Ct. 893 (1958), held that in diversity of citizenship suits brought in Federal District Courts, questions of fact related to whether state Workmen's Compensation laws operate as a bar to common law negligence actions are jury questions. This Court did not pass on the question whether the rule which it laid down in the *Byrd* case was of constitutional dimension.[2]

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[2]Footnote 10 of the Court's opinion states as follows:

> Our conclusion makes unnecessary the consideration of—and we intimate no view upon—the constitutional question whether the right of jury trial protected in federal courts by the Seventh Amendment embraces the factual issue of statutory immunity when asserted, as here, as an affirmative defense in a common-law negligence action. 356 U.S. at 537, 78 S.Ct. at 901, n.10.

Assuming, *arguendo*, for purposes of this Brief, that the *Byrd* holding does have constitutional underpinnings,[3] there has been no invasion of Petitioner's constitutional rights in this case; this Court has repeatedly held that the Seventh Amendment is not binding upon the States, as disclosed by the following cases:

Edwards v. Elliott, 21 Wall. 532, 22 L.Ed. 487 (1874)

Walker v. Sauvinet, 92 U.S. 90, 23 L.Ed. 678 (1876)

Pearson v. Yewdall, 95 U.S. 294, 24 L.Ed. 436 (1877)

Iowa Central R. Co. v. Iowa, 160 U. S. 389, 16 S.Ct. 344 (1896)

Minneapolis & St. L. R. Co. v. Bombolis, 241 U.S. 211, 36 S.Ct. 595 (1916)

St. Louis & S. F. R. Co. v. Brown, 241 U.S. 223, 36 S.Ct. 602 (1916)

Chesapeake & Ohio R. Co. v. Carnahan, 241 U.S. 241, 36 S.Ct. 594 (1916)

Louisville & Nashville R. Co. v. Stewart, 241 U.S. 261, 36 S.Ct. 586 (1916)

Chesapeake & Ohio R. Co. v. Kelly, 241 U.S. 485, 36 S.Ct. 630 (1916)

St. Louis & Kansas City Land Co. v. Kansas City, 241 U.S. 419, 36 S.Ct. 647 (1916)

Chesapeake & Ohio Ry. Co. v. Gainey, 241 U.S. 494, 36 S.Ct. 633 (1916)

Mountain Timber Co. v. Washington, 243 U.S. 219, 37 S.Ct. 260 (1917)

New York Central R. Co. v. White, 243 U.S. 188, 37 S.Ct. 247 (1917)

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[3]The fact that the issue was left undecided in *Byrd* is an additional reason why, as developed more fully in Section II of this Brief, this is not an appropriate case to consider the relationship between the Seventh and Fourteenth Amendments.

Hawkins v. Bleakly, 243 U.S. 210, 37 S.Ct. 255 (1917)

Wear v. State of Kansas, 245 U.S. 154, 38 S.Ct. 55 (1917)

Chicago, R. I. & P. R. Co. v. Ward, 252 U.S. 18, 40 S.Ct. 275 (1920)

Wagner Electric Mfg. Co. v. Lyndon, 262 U.S. 226, 43 S.Ct. 589 (1923)

Southern Ry. Co. v. City of Durham, 266 U.S. 178, 45 S.Ct. 51 (1924)

Dohany v. Rogers, 281 U.S. 362, 50 S.Ct. 299 (1930)

These holdings have been as emphatic as they have been numerous. In *Minneapolis & St. L. R. Co. v. Bombolis, supra,* the Court stated as follows:

> Two propositions as to the operation and effect of the 7th Amendment are as conclusively determined as is that concerning the nature and character of the jury required by that Amendment where applicable. (a) That the first ten Amendments, including, of course, the 7th, are not concerned with state action, and deal only with Federal action. * * * [Citing Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672, and other cases.] (b) that the 7th Amendment applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts, or the standards which must be applied concerning the same. Livingston v. Moore, 7 Pet. 469, 552, 8 L. ed. 751, 781; Supreme Justice v. Murray (Supreme Justice v. United States) 9 Wall. 274, 19 L. ed. 658; Edwards v. Elliott, 21 Wall. 532, 22 L. ed. 487; Walker v. Sauvinet, 92 U.S. 90, 23 L. ed. 678; Pearson v. Yewdall, 95 U.S. 294, 24 L. ed. 436. So completely and conclusively have both of these principles been settled, so expressly have they been recognized without dissent or question almost from the beginning in the accepted interpretation of the Constitution, in the enactment of laws by Congress and proceedings in the

Federal courts, and by state Constitutions and state enactments and proceedings in the state courts, that it is true to say that *to concede that they are open to contention would be to grant that nothing whatever had been settled as to the power of state and Federal governments or the authority of state and Federal courts and their mode of procedure from the beginning.* 36 S.Ct. at 596-97. (Emphasis added.)

There is not one single case in any jurisdiction, either federal or state, which we have been able to find, which has either held or even suggested that the provisions of the Seventh Amendment have been "absorbed" into the Fourteenth. On the contrary, in addition to the United States Supreme Court authorities cited above, there are numerous jurisdictions, both federal and state, which have held that issues of jury trial in state civil cases are within the exclusive domain of the states.[4] Several of these de-

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[4]ALABAMA—*Ex parte Homewood Dairy Products Co.*, 241 Ala. 470, 3 So. 2d 58 (1941); *Kraas v. American Bakeries Co.*, 231 Ala. 278, 164 So. 565 (1935); COLORADO—*Parker v. McGinty*, 77 Colo. 458, 239 Pac. 10 (1925); CONNECTICUT—*Gray v. Mossman*, 91 Conn. 430, 99 Atl. 1062 (1917); FLORIDA—*Ruth v. Sorensen*, 104 So. 2d 10 (Fla. 1958); *Florida East Coast Ry. Co. v. Hayes*, 67 Fla. 101, 64 So. 504 (1914); GEORGIA—*Porter v. Watkins*, 217 Ga. 73, 121 S.E.2d 120 (1961); INDIANA—*Hayworth v. Bromwell*, 158 N.E.2d 285 (1959); IOWA—*Gatton v. Chicago, R. I. & P. Ry. Co.*, 95 Iowa 112, 63 N.W. 589 (1895); KENTUCKY—*Drury v. Franke*, 247 Ky. 758, 57 S.W.2d 969 (1933); LOUISIANA—*Fontenot v. Marquette Cas. Co.*, 161 So. 2d 467 (La. App. 1963); MASSACHUSETTS—*Bothwell v. Boston Elevated Ry. Co.*, 215 Mass. 467, 102 N.E. 665 (1913); MISSISSIPPI—*Gulf & S. I. R. Co. v. Hales*, 140 Miss. 829, 105 So. 458 (1925); MISSOURI—*Irwin v. Globe-Democrat Pub. Co.*, 368 S.W.2d 452 (Mo. 1963); MONTANA—*Cunningham v. Northwestern Imp. Co.*, 44 Mont. 180, 119 Pac. 554 (1911); NEW YORK—*Middleton v. Whitridge*, 213 N.Y. 499, 108 N.E. 192 (1915); OKLAHOMA—*Adams v. Iten Biscuit Co.*, 63 Okl. 52, 162 Pac. 938 (1917); *St. Louis & S. F. R. Co. v. Brown*, 45 Okl. 143, 144 Pac. 1075 (1914), *aff'd*, 241 U.S. 223, 36 S.Ct. 602; RHODE ISLAND—*In re Condemnation of Certain Land for New State House*, 19 R.I. 326, 33 Atl. 448 (1895); TEXAS—*White v. White*, 183 S.W. 369 (Tex. Civ. App. 1916); VERMONT—*Parizo v. Wilson*, 101 Vt. 514, 144 Atl. 856 (1929); *Hall v. Armstrong*, 65 Vt.

FOOTNOTE CONTINUED ON NEXT PAGE

cisions have been handed down in comparatively recent times.[5]

This Court also recognized the principle in *Byrd v. Blue Ridge Electric Cooperative, Inc.*, 356 U.S. 525, 78 S.Ct. 893 (1958). At issue in *Byrd*, a diversity of citizenship case brought in the District Court for the Western District of South Carolina, was whether the South Carolina Workmen's Compensation Act acted as a bar to the bringing of a suit by Mr. Byrd against his employer. Under the law of South Carolina, as under the law of Arizona and many other states,[6] such questions are questions for the Court. This Court in *Byrd* declared the federal rule to be otherwise. The question was thus squarely raised whether in federal diversity cases the division of function between judge and jury so affects the "outcome" of the dispute as to require application of state

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424, 26 Atl. 592 (1893); WASHINGTON—*Donaldson v. Great Northern Ry. Co.*, 89 Wash. 161, 154 Pac. 133 (1916), *aff'd*, 246 U.S. 121, 38 S.Ct. 230; *State of Washington v. Mountain Timber Co.*, 75 Wash. 581, 135 Pac. 645 (1913), *aff'd*, 243 U.S. 219, 37 S.Ct. 260 WISCONSIN—*Richie v. Badger State Mut. Cas. Co.*, 22 Wis.2d 133, 125 N.W.2d 381 (1963). And see the following lower federal court cases: *Gustafson v. Peck*, 216 F. Supp. 370 (N.D. Iowa 1963); *O'Donnell v. Watson Bros. Transportation Company*, 183 F. Supp. 577 (N.D. Ill. 1960); *Blass v. Weigel*, 85 F. Supp. 775 (D.C. N.J. 1949); *New Jersey Chiropractic Ass'n. v. State Board*, 79 F. Supp. 327; (D.C. N.J. 1948); *Gibson v. Bellingham & N. Ry. Co.*, 213 Fed. 488 (W.D. Wash. 1914).

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[5]See, *e.g.*, *Gustafson v. Peck*, 216 F. Supp. 370 (N.D. Iowa 1963); *Fontenot v. Marquette Cas. Co.* 161 So. 2d 467 (La App. 1963); *Irwin v. Globe-Democrat Publ. Co.*, 368 S.W.2d 452 (Mo. 1963); *Richie v. Badger State Mut. Cas. Co.*, 22 Wis.2d 133, 125 N.W.2d 381 (1963); *Porter v. Watkins*, 217 Ga. 73, 121 S.E.2d 120 (1961) and *O'Donnell v. Watson Bros. Transportation Company*, 183 F. Supp. 577 (N.D. Ill. 1960).

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[6]See *Adams v. Davison-Paxon Co.*, 230 S.C. 532, 96 S.E.2d 566 (1957); *Dolese Bros. v. Tollett*, 162 Okl. 158, 19 P.2d 570 (1933); *Burgess v. Gibbs*, 262 N.C. 462, 137 S.E.2d 806 (1964); *Vescio v. Pennsylvania Electric Co.*, 9 A.2d 546 (Pa. 1939); *Freire v. Matson Nav. Co.*, 109 P.2d 1022 (Cal. App. 1941).

rather than federal law under *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938) and *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 65 S.Ct. 1464 (1945).[7]

This Court held that the South Carolina rule did not so affect the outcome as to be required under *Erie* and *York*. The implicit assumption underlying not only the holding, but also the entire approach in *Byrd* was that the state rule involved there—the same as the Arizona rule at issue here—contravened no federal constitutional principle. This premise was in fact expressly announced at one point, the Court stating: "A State may, of course, distribute the functions of its judicial machinery as it sees fit." 356 U.S. at 536, 78 S.Ct. at 900.

Nor can it be inferred that since many of the provisions of the first eight amendments in recent years have been held "absorbed" into the due process clause of the Fourteenth Amendment,[8] that all of the provisions of the first eight amendments are, or should be, binding upon the States.

The relevant inquiry, at least since *Palko v. Connecticut*, 302 U.S. 319, 58 S.Ct. 149 (1937), is whether the particular provision under consideration rises to such dignity that it can be characterized as "of the very essence of a scheme of ordered liberty." 302 U.S. at 325, 58 S.Ct. at 152. The suggestion that all of the provisions of the first eight amendments have been

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[7]The Court stated the issue as follows:

> Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another in the state court. 356 U.S. at 538, 78 S.Ct. at 901.

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[8]*Klopfer v. North Carolina*, ___ U.S. ___, 87 S.Ct. 988 (1967); *Washington v. Texas*, ___ U.S. ___, 87 S.Ct. 1920 (1967); *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065 (1965); *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489 (1964); *Gideon v. Wainright*, 372 U.S. 335, 83 S.Ct. 792 (1963); *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961).

"incorporated" into the Fourteenth and are therefore binding upon the States has never commanded a majority in this Court.[9] Recent cases extending the coverage of the Fourteenth Amendment have all followed the traditional approach set forth in *Palko v. Connecticut*, that only those provisions which are of such magnitude that they can be said to be "implicit in the concept of ordered liberty" are binding upon the states. See, *e.g., Klopfer v. North Carolina*, ___ U.S. ___, 87 S.Ct. 988, 993 (1967) (characterizing the right to speedy trial as one which "has its roots at the very foundation of our English law heritage"); *Washington v. State of Texas*, ___ U.S. ___, 87 S.Ct. 1920, 1922 (1967) (describing the right to compulsory process for attendance of witnesses as "so fundamental and essential to a fair trial that it is incorporated in the Due Process Clause of the Fourteenth Amendment"); *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S.Ct. 1489, 1492 (1964); and *Gideon v. Wainright*, 372 U.S. 335, 343-44, 83 S.Ct. 792, 796 (1963) (holding the privilege against self-incrimination and the right to counsel to be "fundamental right[s] essential to a fair trial").

By its own terms, the Seventh Amendment negates any suggestion that it rises to such a level as to be of the "very essence of a scheme of ordered liberty" or to "have its roots at the very foundation of our English law heritage." Unlike the provisions with which the afore-cited cases dealt, the Seventh Amendment applies only to civil cases. Moreover, there is no other provision in the Bill of Rights which is expressly tied to a specific monetary limitation. The contention that a rule of law which guarantees jury trial in cases involving $20.01 but not in cases involving an even $20.00 could be a right which is "implicit in the concept of ordered liberty" is patently absurd. Such a contention would not only render "fundamental rights essential to a fair

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[9]See *Gideon v. Wainright, supra*, concurring opinion by Mr. Justice Douglas, 372 U.S. at 345, 83 S.Ct. at 797.

trial" dependent upon a difference of one cent, but would also mean that the dimensions of such rights periodically suffer an automatic *pro tanto* diminution commensurate with rises in the cost of living.

Throughout the course of Anglo-American constitutional history thoughful men have drawn a distinction between trial by jury in civil cases and the criminal protections contained in other provisions of the first eight amendments, particularly jury trial in criminal cases. Great Britain, from whom we inherited the jury system, abolished trial by jury in civil cases in 1933, but retained it for criminal cases. Judge Desmond of the New York Court of Appeals has made the following observation:

> There is now no observable movement to restore civil juries in Great Britain and, except in parts of Canada, they are as a practical matter non-existent (completely non-existent in accident cases) in the British Commonwealth and indeed, in every major country except the United States.[10]

Professors Kalven and Zeisel in their recently published book, *The American Jury,* point out that, "most of the unrest over the jury today is limited to its use in civil trials. It is agreed that the case for the jury in criminal trials is different and much stronger."[11]

The Federalist Papers devoted an entire essay, No. 83, to trial by jury, the dominant theme of that essay being the inextricable link between liberty and trial by jury in criminal cases, and the lack of any necessary connection between liberty and trial by jury in civil cases. In the words of *The Federalist:*

> For my own part, the more the operation of the institution [of trial by jury in criminal cases] has fallen under my ob-

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[10]Desmond, *Should it Take Thirty-four Months for a Jury Trial?*, N.Y. Times, Dec. 8, 1963 (Magazine), pp. 29, 74.

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[11]KALVEN and ZEISEL, THE AMERICAN JURY at 9 (1966).

> servation, the more reason I have discovered for holding it in high estimation; and it would be altogether superfluous to examine to what extent it deserves to be esteemed useful or essential in a representative republic, or how much more merit it may be entitled to, as a defence against the oppressions of the hereditary monarch, than as a barrier to the tyranny of popular magistrates in a popular government. Discussions of this kind would be more curious than beneficial, as all are satisfied of the utility of the institution and of its friendly aspect to liberty; ***but I must acknowledge that I cannot readily discern the inseparable connection between the existence of liberty and the trial by jury in civil cases.*** *The Federalist,* No. 83, at 461-62 (Colonial Press, Rev. Ed.) (Emphasis added.)

The use of liberty as the standard for comparison of trial by jury in civil and criminal cases is especially interesting in light of this Court's test as announced in *Palko v. Connecticut,* inquiring whether a particular provision is "implicit in the concept of ordered liberty", and the further observation in *Palko* that, "if the Fourteenth Amendment has absorbed [particular provisions] the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. . . ." 302 U.S. at 326 58 S.Ct. at 152.

In an article entitled *"Selective Incorporation" in the Fourteenth Amendment,* 73 YALE L. J. 74 (1963, Professor Louis Henkin extols the virtues of "selective incorporation," one of whose principal advantages, according to Professor Henkin, is the following:

> And since it does not involve automatic absorption of the whole of the Bill of Rights, selective incorporation permits the abandonment, as regards the states, of one or more provisions of the Bill of Rights that seem less important and would be too onerous—***say, that dated provision in the seventh amendment requiring a jury trial in civil cases where the value in controversy exceeds twenty dollars.*** For the rest, ***selective incorporation could apply to the states all the 'im-***

portant' provisions of the Bill of Rights in their full and growing vigor. (73 YALE L. J. at 76.) (Emphasis added.)

Similarly, Professor Charles Fairman, in an exhaustive article, *Does the Fourteenth Amendment Incorporate The Bill of Rights? The Original Understanding,* 2 STAN. L. REV. 5 (1949), Concludes that the history of the times surrounding the passage of the first Civil Rights Act and the Fourteenth Amendment, refutes the notion that the Fourteenth Amendment was intended to incorporate all of the Bill of Rights. Professor Fairman observed that if total incorporation had been intended by the Fourteenth Amendment, states whose laws differed significantly from the provisions of the Bill of Rights would have been less ready to ratify. The prime example advanced in support of this aspect of his argument is the Seventh Amendment. Professor Fairman states as follows:

> To make the Seventh Amendment binding upon the states —the very thought of it would have given pause to the state legislatures. Religious liberty, freedom of speech and of the press, the essentials of a fair trial—values such as these seem eternally good and true and one can imagine a legislature accepting a new obligation to observe them. There have been men so attached to the practices of the common law as to place the grand jury among these eternal values, even though by 1866 some states were prosecuting felonies upon information. *But no one could reasonably hold that it was inherent in justice that the states make available a jury of twelve men in any case where more than $20 was involved.* (Recall at this point the gradual decline of the purchasing price of the dollar.) The very fact that the proposed Amendment was so readily accepted by so many legislatures is on its face enough to throw grave doubt on the theory that it incorporated Amendments I to VIII. 2 STAN. L. REV. at 83-84, (Emphasis added.)

The late Mr. Justice Frankfurter, in his *Memorandum on "Incorporation" of the Bill of Rights into the Due Process*

Clause of the Fourteenth Amendment, 78 HARV. L. REV. 746 (1965), makes the following observation concerning the original understanding as to the relationship between the Seventh Amendment and the Due Process Clause of the Fourteenth:

> In *Twitchell v. Pennsylvania*, 7 Wall. 321, the Court rejected an argument that the Fifth and Sixth Amendments applied to the States, relying on *Barron v. Baltimore*, 7 Pet. 243, and subsequent cases. In *Justices v. Murray*, 9 Wall. 274, the Court accepted as settled that the Seventh Amendment did not apply to the States. Neither case intimates that anyone even thought of proposing that these amendments had been newly brought to bear on the States by the Fourteenth. Yet the Fourteenth's formulation and adoption had been a subject of great interest, especially to lawyers and judges, only months prior to the decision of these cases. The significance of this contemporaneous understanding need not be labored. 78 HARV. L. REV. at 750 (1965).

II

Even if this Court were to conclude that the scores of cases in this and other Courts unanimously holding that the Seventh Amendment is not binding upon the States should be re-examined, this is neither the time nor the case in which to do it.

A. This Court in *Byrd v. Blue Ridge Electric Cooperative, Inc., supra*, held that the federal rule applicable in diversity cases was dictated by "the influence—if not the command—of the Seventh Amendment. . . ." 356 U.S. at 537, 78 S. Ct. at 901. The Court expressly disclaimed any views upon "the constitutional question whether the right of jury trial protected in federal courts by the Seventh Amendment embraces the factual issue of statutory immunity when asserted, as here, as an affirmative defense in a common-law negligence action." 356 U.S. at 537, 78 S. Ct. at 901, n. 10.

This case raises, therefore, at best, only a peripheral Seventh

Amendment question. If the cases cited above were to be re-examined, it would seem preferable to do so in the context of a case involving issues which lie at the core, rather than the periphery—or perhaps completely outside the ambit—of the Seventh Amendment.[12]

B. The Petition for Certiorari scarcely mentions the federal issue, and is utterly devoid of any analysis or argument concerning it. This almost exclusive devotion to state issues was also characteristic of the Petitioner's briefs before the Arizona Court, and both the majority and the dissenting opinions in the Court below restricted themselves entirely to non-federal issues. As a result, the case comes to this Court without the benefit of the sharpening and refinement of issues which result from a lower court having come to grips with the federal problem and reached a solution.

C. The American jury system, including its underlying conceptual premises, and its strengths and weaknesses as a means of resolving questions of fact, is currently undergoing one of the most careful and intensive studies ever undertaken in any field of law, under the direction of Professors Kalven and Zeisel at the University of Chicago. Two books have already been published.[13] The next volume, dealing with civil jury trials, should be forthcoming within a short time.

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[12]Significant in this regard is the fact that Workmen's Compensation laws—and necessarily, therefore, the extent to which these laws operate as a bar to common law negligence suits—were not known at common law nor at the time the Seventh Amendment was adopted. See *Lewis and Clark County v. Industrial Acc. Board* 52 Mont. 9, 155 Pac. 268 (1916).

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[13]KALVEN and ZEISEL, THE AMERICAN JURY (1966); and ZEISEL, KALVEN and BUCHHOLZ, DELAY IN THE COURTS (1959). In addition, the Jury Project Study has resulted in "some sixty or so articles on various aspects of the jury." KALVEN and ZEISEL, THE AMERICAN JURY at vi.

These studies potentially provide the raw material for some very helpful experimentation by the fifty state judiciaries in our federal system. As Mr. Justice Brandeis observed, "It is one of the happy incidents of the federal system that a . . . State may . . . serve as a laboratory; and try novel social and economic experiments. . . ." *New State Ice Co. v. Leibmann*, 285 U.S. 262, 280, 311, 52 S. Ct. 371, 375, 386 (1932).

Even assuming that the time may come when the federal standard for civil jury trials should be made binding upon the states, this is manifestly not the time, when our system is just at the threshold of the first serious, systematic inquiry into the fundamental postulates and the practical operations of the jury system. At a very minimum, opportunity should be allowed for attempts by the states to make whatever practical application might be indicated from these forthcoming studies. It would seem a monumental error to freeze for all time the further development and adaptation of the jury system by forcing it into a mold which was cast some 200 years ago. It is conceivable, though barely so, that it could eventually be shown that the right to trial in civil cases by juries which conform to the pattern that existed at common law in all cases involving more than $20.00 is of a fundamental nature. But clearly, such a determination can more appropriately be made after there has been opportunity for interaction between the studies which are presently being conducted and the experimental possibilities which exist within our federal system.

An example which readily comes to mind concerns the number of persons who must serve on a jury. This Court has held that the Seventh Amendment, "has in effect adopted the rules of the common law in respect of trial by jury as these rules existed in 1791." *Dimick v. Schiedt*, 293 U. S. 474, 487, 55 S. Ct. 296, 301 (1935). See also *Dagnello v. Long Island Rail Road Company*, 289 F. 2d 797 (2d Cir. 1961); *Schaefer v. Gunzburg*,

246 F.2d 11 (9th Cir. 1957), *cert. denied* 355 U.S. 831, 78 S.Ct. 45; *Diederich v. American News,* 128 F.2d 144 (10th Cir. 1942). It follows—and has been so held—that the jury required by the Seventh Amendment is a jury composed of twelve persons. *Diederich v. American News, supra.*

The laws of the State of Arizona vest in the Justices of the Peace exclusive jurisdiction over all civil actions involving less than $200.00, and concurrent jurisdiction with the Superior Court over all civil actions involving between $200.00 and $500.00. ARIZ. REV. STAT. ANN. § 22-201 (1964). Arizona statutes further provide that juries in civil cases heard in Justice of the Peace Courts shall be composed of six persons unless the parties consent to try the action with a lesser number, not less than three. ARIZ. REV. STAT. ANN. § 21-103 (1962). This six-person jury system in small claims cases has proven to be a workable and practical accomodation of, on the one hand, the benefits of the jury system, and, on the other, the need to keep the court costs somewhat commensurate with the amount at issue in the lawsuit. Can it really be said that in requiring cases involving more than $20.00 but less than $200.00 to be tried to a six-person jury, Arizona has struck a blow "at the very foundation of our English law heritage." *Klopfer v. North Carolina, supra,* 87 S.Ct. at 993.

Similarly, the recent abolition by Great Britain of the unanimity rule, and the extensive debate which preceded it,[14] are important for present purposes because they illustrate the extent to which reasonable minds may differ on yet another aspect of civil jury

[14]The proposal was originally made by the British Home Secretary in the fall of 1966. It was debated in Parliament on April 26 and 27, 1967, and carried by a vote of 180 to 102. See KALVEN and ZEISEL, *The American Jury, Notes for an English Controversy,* 48 CHICAGO BAR RECORD 195 (1967). The debate, of course, concerned only the abolition of the unanimity rule as it applied to criminal jury trials, the English having abolished civil jury trials some 30 years ago.

trials. Manifestly, it cannot be said that abolition of the unanimity rule has rendered the British system one in which "a fair and enlightened system of justice [is] impossible."[15]

D. One of the most pressing problems currently facing the judicial systems of this nation is the lengthening period of time required for the adjudication of legal rights. In the words of Mr. Chief Justice Warren:

> . . . the delay and the choking congestion in the federal courts today have created a crucial problem for constitutional government in the United States. . . . It is compromising the quantity and quality of justice available to the individual citizen and, in so doing, it leaves vulnerable throughout the world the reputation of the United States. . . .[16]

It is submitted that, in accordance with the observations of the Chief Justice quoted above, the States have not only a legitimate interest but also an obligation to lessen congestion and delay in their courts. It is highly likely that efforts toward this end may represent departures of one type or another from the civil jury

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[15] *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152 (1937). Arizona law also provides that the concurrence of nine or more jurors shall be sufficient to render a verdict in a civil case. ARIZ. REV. STAT. ANN. § 21-102B (1956). Although there appear to be no studies right on point, it is probably safe to say that a majority of the states depart from the Federal standard to one extent or another with regard either to the unanimity rule or the size of the jury. See Appendix to Mr. Justice Frankfurter's, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746, 768 (1965).

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[16] Warren, *Delay and Congestion in the Federal Courts*, 42 J. AM. JUD. SOC. 6-7 (1958).

which was known and used hundreds of years ago.[17] Arizona has already taken a step in this direction by providing for a six-person jury in small claims cases. Other courts might wish to experiment, for example, with a requirement that all cases involving less than a minimum amount be tried to the court. If, in a given instance, variations from the common law jury, in an effort to relieve congestion and delay, should amount to a denial of due process of law, the remedy could be provided by this Court and other courts. But there should not be imposed upon such efforts from the outset an arbitrary Twenty Dollar limitation.

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[17]Kalven and Zeisel observe that, "The argument about the jury in civil cases has become much involved in the problem of court congestion." KALVEN AND ZEISEL, THE AMERICAN JURY at 9. In an earlier work, ZEISEL, KALVEN and BUCHHOLZ, DELAY IN THE COURT (1959), inquiry is made into the causes and solutions for court delay. Chapter six is devoted to the relationship between civil jury trials and court congestion, as shown by a study of one court system, the Supreme Court of New York County. The conclusion was:

> With all the indicated limitations, we are satisfied that for New York our figure will serve its purpose, as an estimate for the savings that could be made if any portion of the Courts' present jury trials could be converted into bench trials: roughly 40 per cent of the former trial time would be saved. ZEISEL, KALVEN and BUCHHOLZ, *supra*, at 81.

CONCLUSION

This case does not involve "a single decision by a closely divided Court, unsupported by the confirmation of time. . . ."[18] The many authorities supporting the Respondent's position as to the federal issue extend over a period of more than three-quarters of a century. There is no contra authority.

The Petitioner has demonstrated no reason whatever why these authorities should be re-examined. Moreover, it affirmatively appears that this case does not adequately raise the central issue, and that the time is not now ripe for consideration of that issue. It is therefore respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[18] *Kovacs v. Cooper*, 336 U.S., 77 89, 69 S.Ct. 448, 454 (1949) (Concurring opinion).

APPENDIX

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

ROBERT D. MORGAN, Plaintiff vs. METRO-GOLDWYN-MAYER, INC., a Delaware corporation, Defendant	No. 145087 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

This matter having come on regularly for hearing before the Court on June 10, 1964, on Defendant's Motion to Dismiss, and the Court having heard evidence on said date, and the hearing of evidence having continued through June 11, 12 and 15, respectively, and the Court having heard argument of counsel, taken the matter under advisement, and now being fully advised in the premises makes Findings of Fact, Conclusions of Law, and enters Judgment as follows:

FINDINGS OF FACT

1. The plaintiff, Robert D. Morgan, is, and at all times relevant hereto was, a citizen and resident of the state of California.

2. The Defendant, Metro-Goldwyn-Mayer, Inc., hereinafter referred to as "employer", is, and at all times relevant hereto was a corporation incorporated under and by virtue of the laws of the

State of Delaware and having a principal place of business in Culver City in the State of California.

3. On March 9, 1962, at the offices of employer in Culver City, California, Plaintiff entered into a written contract of employment with the employer whereby Plaintiff agreed to perform as a stunt man for employer in the filming of a motion picture entitled "HOW THE WEST WAS WON", which picture was to be partially filmed at various locations in the State of Arizona.

4. This Court can and does take judicial notice of the provisions of Sections 3600.5 and 3601 of the Labor Code of the State of California, as follows:

"§ 3600.5 Injuries in extraterritorial employment

"(a) Domestic employment; foreign injury. If an employee who has been hired or is regularly employed in this State receives personal injury by accident arising out of and in the course of such employment outside of this State, he, or his dependents in the case of his death, shall be entitled to compensation according to the law of this State.

"§ 3601. Exclusive remedy. Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is, except as provided in section 3706, the exclusive remedy against the employer for the injury or death. (Stats. 1937, C. 90, p. 269, § 3601.)"

The Court can and does take judicial notice of the fact that the aforesaid statutes were in full force and effect on the date that plaintiff was injured in the course and scope of said employment in the State of Arizona as hereinafter set forth.

5. The employer fully complied with the laws of the State of California and had in full force and effect Workmen's Compensation Insurance in compliance with the laws of the State of

California which covered the plaintiff in his employment by employer.

6. The employer complied with the laws of the State of Arizona with respect to securing Workmen's Compensation Benefits for the plaintiff and the employer's other employees by obtaining a policy of insurance in the State Fund of Arizona through the Industrial Commission of Arizona which said policy was in full force and effect at all times relevant hereto.

7. The employer is a member of the movie industry, and among other things, engaged in the business of filming and making motion pictures.

8. The Court takes judicial notice of the case of *Gene Autry Productions against Industrial Commission,* 67 Ariz. 290, and its holding.

9. The Court can and does take judicial notice of the fact that subsequent to the decision of the Supreme Court of Arizona in the *Gene Autry Case,* Supra, the people of Arizona adopted an initiative measure which became effective on November 22, 1948, and which is now subsection E of Section 23-1041, Arizona Revised Statutes, which said initiative measure provided that in computing the average monthly wage of employees for purposes of Workmen's Compensation, there shall be excluded from such computation all amounts or wages or other compensation for services in excess of $1,000.00 per month.

10. That after the adoption of the aforesaid initiative measure the Industrial Commission of Arizona and the movie industry negotiated and agreed upon an endorsement to Workmen's Compensation Insurance policies issued to members of the movie industry in the State of Arizona, which endorsement is in the form of "Exhibit 25" in evidence, said exhibit being an endorsement to and a part of the Workmen's Compensation Insurance policy

issued to the employer in connection with the filming of the picture "HOW THE WEST WAS WON".

11. The purposes of the aforesaid endorsement to said Workmen's Compensation Insurance policies and the administrative practices adopted by the Industrial Commission of Arizona in connection with the use thereof is to give actual notice to employees of employers who are members of the movie industry of the existence of Workmen's Compensation Insurance Benefits for such employees; the right of such employees to reject the provisions of the Arizona Workmen's Compensation Law; that if they do not reject the law they are deemed to have accepted the benefits thereof; the amount of their compensation benefits and the manner in which the same shall be determined and to form an agreement between the employer and the Industrial Commission of Arizona with respect to the computation of premiums of such policies.

12. Subsequent to the adoption of the form of "Exhibit 25" in evidence by the Industrial Commission and the movie industry, the Industrial Commission of Arizona, in accordance with its administrative practices, assigns an investigator to each employer in the movie industry filming a picture or a portion of a picture in the State of Arizona to contact each employee of such employer, present "Exhibit 25" to such employee for signature and to explain, upon request, the content, purpose and function of said document.

13. In connection with his employment by employer, Plaintiff came from the State of California to Prescott, Arizona, on March 11, 1962. On that date employer maintained a business office in the St. Michael's Hotel in Prescott, Arizona, in connection with its filming location near Perkinsville, Arizona, and in the Arcadia Lodge Motel in Kingman, Arizona, in connection with its filming location near Oatman, Arizona.

14. On the 12th day of March, 1962, one Harry J. Hamilton, an employee and investigator of the Industrial Commission of Arizona, having been assigned by said Commission to the Prescott and Perkinsville office and location of the employer in connection with the filming of the picture "HOW THE WEST WAS WON", presented "Exhibit 25" in evidence to the plaintiff while on location at Perkinsville, Arizona, and said "Exhibit 25" was signed by the Plaintiff on that date.

15. The Plaintiff knew that the person presenting said "Exhibit 25" to him for signature was an employee of the Industrial Commission of Arizona, and he further knew that the document which he signed, among other things, provided that in case of injury in the course of his employment his Workmen's Compensation Benefits would be a maximum of 65% of $1,000.00 per month.

16. At the time the plaintiff signed "Exhibit 25" in evidence he was not mislead, defrauded, coerced or otherwise prohibited from reading or understanding all of the provisions thereof.

17. The employer had the statutory notice of Workmen's Compensation posted upon a bulletin board located near the paymaster's desk in its office in the St. Michael's Hotel in Prescott, Arizona.

18. The plaintiff was in the aforesaid office of the employer in the St. Michael's Hotel in Prescott, Arizona, on or about March 12, 1962, and received cash for a meal allowance from the auditor or paymaster of the employer in said office.

19. On or about March 18, 1962, plaintiff was transferred by employer to Kingman, Arizona, where he worked at its filming location at Oatman, Arizona, until the latter part of March, 1962.

20. Omitted.

21. In addition to the aforesaid offices at Prescott and King-

man, Arizona, from on or about March 12, 1962, until on or about April 25, 1962, employer maintained an office in the Velda Rose Motel east of Mesa, Arizona, and had a filming location on the Magma Railroad west of Superior, Arizona. Meal allowances and advances on salaries to employees working in connection with the filming on the Magma Railroad were paid by employer from its office in the Velda Rose Motel.

22. During the latter part of March, 1962, or early April, 1962, plaintiff was transferred from Kingman, Arizona, to Mesa, Arizona.

23. Various employees of employer stayed at the Ramada Inn in Phoenix and at the Superstition Ho Hotel at Apache Junction in connection with the filming work which employer did on the Magma Railroad. Bulletin boards for call sheets and other notices were maintained by employer in each of these hotels.

24. The employer had the statutory notice of Workmen's Compensation posted in its office in the Velda Rose Motel, east of Mesa, Arizona, first upon the end of the counter and then on the bulletin board from on or about March 12, 1962, until said office was closed on or about April 25, 1962.

25. The places where the Workman's Compensation notices were posted on defendant's premises were conspicuous but defendant did not prove that such a notice was posted in or about the Ramada Inn or the Superstition Ho Hotel or on the job site near Queens where it was doing filming work on the Magma Railroad at the time of plaintiff's injury.

26. The employer had the rejection slips referred to in Section 23-906, ARS, available at its office where plaintiff was employed and at each of its offices in the State of Arizona during all of the time of plaintiff's employment.

27. On April 9, 1962, while engaged in doing stunt work

on location near Superior, Arizona, in the course and scope of his employment, plaintiff sustained the injuries out of which his present claim arose.

28. Following his injuries on April 9, 1962, plaintiff was hospitalized in Good Samaritan Hospital in Phoenix, Arizona, until September 4, 1962, at which time he was released to go to a hospital in Los Angeles, California.

29. Following his admission to the hospital and on or about April 16, 1962, plaintiff sought and obtained the legal advice of the law firm of Snell & Wilmer, Phoenix, Arizona, and in particular, consulted with Mr. Frederick K. Steiner, Jr., a partner, and Donald Daughton, an associate of that law firm.

30. On April 16 and again on April 19, 1962, when plaintiff was interviewed by said attorneys while in the hospital, he was lucid and responsive and was able to give an account of the accident and expressed a strong desire to sue his employer for what he believed was their negligence. He advised said attorneys that he had signed some document respecting Workmen's Compensation and that, among other things, said document provided that his benefits would be 65% of $1,000.00 per month.

31. The plaintiff sought and received legal advice from said attorneys with respect to whether or not he had an option to sue his employer for damages; that he was advised by said attorneys that his sole and exclusive remedy was a claim against the Industrial Commission of Arizona for Workmen's Compensation Benefits unless his employer failed to comply with the requirements of the Act in obtaining Workmen's Compensation Insurance, posting of notices or availability of rejection slips. Said attorneys advised him that he should accept Workmen's Compensation Benefits, said advice being given both orally and in writing.

32. After consulting with said attorneys and on or about April

23, 1962, plaintiff executed or caused to be executed and filed with the Industrial Commission of Arizona a document entitled "Workman's Report of Injuries and Application for Benefits".

33. Thereafter and on May 23, 1962; June 27, 1962; July 13, 1962; July 20, 1962; July 28, 1962; August 2, 1962; August 16, 1962; September 1, 1962; September 16, 1962; October 1, 1962; October 17, 1962; November 2, 1962; November 16, 1962; and December 2, 1962, plaintiff executed or caused to be executed documents entitled "Workman's Supplemental Claim for Compensation" and filed or caused the filing of said documents with the Industrial Commission of Arizona, knowing and understanding that these were claims for Workmen's Compensation.

34. The Industrial Commission of Arizona caused to be paid and plaintiff accepted Workmen's Compensation Benefits pursuant to each of the aforesaid "Workman's Report of Injury and Application for Benefits" and "Workman's Supplemental Claim for Compensation" under and pursuant to the provisions of the laws of the State of Arizona for the period from April 10, 1962, through November 16, 1962, in the total sum of $4,795.41.

35. In addition to the aforesaid Workmen's Compensation Benefits, the Industrial Commission of Arizona paid or caused to be paid medical and hospital expenses of plaintiff in the sum of $15,246.70.

36. On or about October 20, 1962, plaintiff consulted with attorneys Raoul D. Magana of Los Angeles, California, and Charles M. Brewer of Phoenix, Arizona, with respect to any option which he might have to sue his employer and thereafter continued to file supplemental claims for Workmen's Compensation and accepted checks in payment of Workmen's Compensation Benefits.

37. The last check which plaintiff received from the Industrial Commission of Arizona, prior to filing his complaint against

employer on December 13, 1962, was accepted, endorsed and cashed by the plaintiff in December of 1962.

CONCLUSIONS OF LAW

The Court concludes:

1. The plaintiff is charged with full kuowledge of the contents of "Exhibit 25" in evidence at all times relevant hereto, and if he failed to read any of the provisions of said document, such failure was due to his own negligence and neglect and was not the result of any fraud or deception on the part of the investigator of the Industrial Commission of Arizona who presented said Exhibit to the plaintiff at the time that he, the plaintiff, executed the same.

2. The plaintiff had actual notice of Workmen's Compensation coverage and of his right to reject the provisions of the Arizona Workmen's Compensation Law and his failure to reject the same conclusively bound him to accept said benefits for any injuries suffered in the course and scope of his employment.

3. Actual knowledge is always better than constructive notice and the actual knowledge of the plaintiff of the contents of "Exhibit 25" in evidence satisfied the requirements of the statutes of this State with respect to the giving of constructive notice by an employer of Workmen's Compensation and the right of employees to reject the benefits of the Act.

4. "Exhibit 25" in evidence, having been negotiated by the movie industry and the Industrial Commission of Arizona, and the same constituting an endorsement to the Workmen's Compensation Insurance Policy issued by the Industrial Commission to the employer and pursuant to the administrative practices adopted by the Industrial Commission of the State of Arizona with respect thereto and the plaintiff having actual knowledge of the contents

thereof and his rights thereunder fully complies with all of the legal requirements on the employer to give notice to its employees of the applicability of Workmen's Compensation Benefits and of the right of its employees to reject the provisions of the Workmen's Compensation Laws of the State of Arizona.

5. The employer fully complied with the provisions of Section 23-906, ARS, with respect to the availability of rejection slips but did not comply with said Section with respect to the continuous posting of the Workmen's Compensation notice referred to in said Section.

6. The plaintiff, by making a claim for Workmen's Compensation Benefits and continuing to accept the same with full knowledge of his legal rights and with full knowledge of the legal conditions precedent to a suit against his employer, waived any right or option, if any, which he ever had to file any claim in this Court against his employer.

7. If plaintiff's exclusive remedy is not vested in the Industrial Accident Commission of the State of California, then his exclusive remedy against his employer is with the Industrial Commission of Arizona under the terms and provisions of the Workmen's Compensation Law of the State of Arizona.

8. By virtue of the foregoing conclusions, this Court does not have jurisdiction over the subject matter of this lawsuit and therefor the defendant's Motion to Dismiss should be granted and this cause should be dismissed and judgment should be entered in favor of the defendant.

JUDGMENT

In accordance with the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED, ADJUDGED AND DECREED that the defendant's Motion to Dismiss for lack of jurisdiction of this Court over the subject matter of plaintiff's complaint be granted, and that plaintiff's complaint be and it is hereby dismissed with prejudice.

DONE IN OPEN COURT This 5th day of January, 1965.

JACK D. H. HAYS
Judge of the Superior Court